Decision 03-08-076 August 21, 2003

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060.	Rulemaking 02-01-011 (Filed January 9, 2002)

ORDER GRANTING LIMITED REHEARING ON THE ISSUE OF THE ALLOCATION OF THE EXCEPTION FOR NEW MUNICIPAL LOAD, MODIFYING DECISION (D.) 03-07-028 FOR PURPOSES OF CLARIFICATION, AND DENYING REHEARING OF DECISION, AS MODIFIED, IN ALL OTHER RESPECTS

I. INTRODUCTION

In Decision (D.) 03-07-028, the Commission imposed a cost responsibility surcharge ("CRS") on Municipal Departing Load ("MDL") within the service territories of Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("Edison") and San Diego Gas & Electric Company ("SDG&E") (collectively, the "IOUs"). This surcharge would be applied to all MDL customers that took bundled service from PG&E, Edison and SDG&E since before February 1, 2001 as well as new municipal load (i.e., load associated with "new" publicly owned utilities) for new MDL customers in the service territories of PG&E, Edison and SDG&E.

The following parties timely filed applications for rehearing of D.03-07-028 ("MDL CRS Decision"): California Municipal Utilities Association ("CMUA"), PG&E, City of San Marcos ("San Marcos"), City of Corona and City

of Irvine ("Cities"), South San Joaquin Irrigation District ("SSJID"), Modesto Irrigation District ("MID") and City of Industry ("Industry").

CMUA, San Marcos, SSJID, and Cities argue that the Commission has acted in excess of its power and jurisdiction by seeking to apply charges to new municipal load. CMUA, San Marcos, Cities, and Industry assert that the MDL CRS Decision interferes with the establishment and operation of municipally owned electric utilities that are newly formed and, thus, constitutes an unlawful regulation of municipal utilities in violation of the rights of these municipalities under Article XI, Section 9(a) of the California Constitution. CMUA argues that the Commission abused its discretion by failing to exempt from the MDL CRS the load that was excluded from PG&E's forecast. San Marcos, Cities and Industry assert that the Commission's cost-shifting justification for not exempting new MDL of a newly formed publicly owned utility[1] is arbitrary and not supported by proven facts and on the record, but is based on speculation. Parties, including, CMUA, MID, Cities, and Industry, raise due process challenges involving the effective date for applying CRS on MDL customers. Industry argues that the MDL CRS Decision's retroactive application ignores past investments and, thus, impairs existing contracts. MID claims that the Commission has violated the Rate Agreement, because this agreement does not permit the imposition of bond-related CRS on MDL. In its rehearing application, MID also advocates that MDL customers must retain exemptions from CRS provided to them as bundled customers. MID further claims that the Commission erred in imposing an obligation to pay CRS on MDL being served because it asserts that Assembly Bill 117 ("AB 117")[2] does not mandate such a requirement. In its rehearing application, SSJID requests a clarification that it is included in the

[1] The publicly owned utilities are also referred to in the MDL CRS Decision as "POUs".
[2] Stats. 2002 (Reg. Sess.), ch. 838.

definition of an existing publicly owned utility. Cities argues that the MDL CRS Decision is not consistent with previous decisions, including D.03-04-030, which permitted exceptions for ultra-clean customer generation, and is a retroactive rate assessment and an improper ex post facto regulation. In its rehearing application, PG&E claims that Ordering Paragraphs 3 and 6 appear to exempt new MDL of existing publicly owned utilities from paying any portion of the CRS, including "tail" CTC and, thus, is inconsistent with the text of the MDL CRS Decision and contrary to Public Utilities Code Section 369.

The following parties filed responses: CMUA, PG&E, Merced Irrigation District and SSJID (jointly, "Merced/SSJID"), SDG&E, Edison, and MID. CMUA, MID and Merced/SSJID filed responses that oppose PG&E's Application for Rehearing. PG&E, SDG&E and Edison filed responses that oppose the rehearing applications filed by CMUA, Cities, San Marcos, MID, SSJID, and Industry.

We have carefully considered each and every allegation raised in the applications for rehearing of the MDL CRS Decision, D.03-07-028, and are of the opinion that except for the issue concerning sufficiency of evidence involving the allocation of the exception for new municipal load, good cause does not exist for granting rehearing. In our consideration of the rehearing applications, we note that MDL CRS Decision should be clarified as specified below. Further, in disposing of the rehearing applications, we correct a few typographical errors in the decision. Accordingly, the applications for rehearing filed by CMUA, Cities, San Marcos, MID, SSJID, PG&E, and Industry are denied in all other respects.

/ / /

/ / /

/ / /

II. DISCUSSION

A. The Commission had the authority to impose CRS on all new municipal load.

The MDL CRS Decision describes our authority to impose CRS on MDL customers. The Commission stated:

> "As a general matter and consistent with the law, the Commission may fix rates and establish rules for the IOUs. [Footnote omitted.] We thus authorize IOU tariff charges necessary to hold MDL customers responsible for costs necessary to prevent cost shifting in accordance with AB 117, thereby ensuring that bundled customers' charges are just and reasonable consistent with Section 451. Section 453 gives the Commission the authority and responsibility to ensure that IOUs do not discriminate or grant any preference or advantage to particular persons, and do not maintain any unreasonable difference as to rates between localities or classes of service. Section 701 grants the Commission discretionary authority to do all things, whether specifically designated in the Code or not, "which are necessary and convenient" in the exercise of its power and jurisdiction. [Footnote omitted.]
>
> Pursuant to these statutes, we have authority to establish charges to recover costs incurred by DWR. Moreover, the State Legislature specifically stated its intent in AB 117 "to prevent any shifting of recoverable costs between customers," when it enacted Section [366.2(d)]. The potential for cost shifting is not limited just to DA customers, but also implicates other load that departs from IOU service, including customers that depart bundled service after February 1, 2001 to be served by a municipality. Such departing customers leave behind costs they helped cause to be incurred to provide them with benefits. MDL customers that left the IOU after February 1, 2001, thus come under the provisions of AB 117. In

> accordance with these statutory requirements, bundled customers may not be unfairly charged for obligations that are the responsibility of MDL customers." (D.03-07-028, pp. 20-21.)

The Commission's authority over the rates and charges of IOUs is constitutionally based. (Cal. Const., art. XII, §§5 & 6; see also, D.03-07-028, p. 20, fn. 36.)

The focus of the rehearing parties' jurisdictional challenges is on the Commission's authority over the new municipal load.[3] CMUA, San Marcos, SSJID, and Cities argue that the Commission has acted in excess of its power and jurisdiction by seeking to apply charges to new municipal load. (CMUA's Application for Rehearing, pp. 2-12; San Marcos' Application for Rehearing, pp. 2-3; SSJID's Application for Rehearing, pp. 3-6; Cities' Application for Rehearing, pp. 5-11.) In particular these rehearing applications are challenging the determination to impose CRS on new customers who were not previously served by an IOU in newly developed areas. CMUA, Cities, San Marco and SSJID argue that AB 117 does not provide the Commission with the requisite authority because Public Utilities Code Section 366.2(d) gives the Commission jurisdiction over MDL customers who had took service from the IOUs and, thus, had a customer relationship on or after February 1, 2001. (CMUA's Application for Rehearing, pp. 6-12; SSJID's Application for Rehearing, pp. 3-5; San Marco's Application for Rehearing, p. 2; Cities' Application for Rehearing, p. 10-11.) SSIJD further argues that the Public Utilities Code Sections 451, 453 and 701 provides the

[3] Except for MID, the rehearing parties do not challenge the Commission's jurisdiction to impose CRS on MDL customers who took bundled service on or after February 1, 2001. MID's arguments against the Commission's jurisdiction are discussed and rejected in Section I of the Discussion Section below.

Commission with the authority to impose CRS on customers of investor-owned utilities, and not new municipal load. (SSJID's Application for Rehearing, p. 5.)[4]

We disagree with the rehearing applicants claim that we are legally barred from holding new municipal load responsible for paying their fair share of the CRS, including new municipal load of those customers who did not take service from any IOU. By enacting Public Utilities Code Section 366.2(d), the Legislature confirmed the Commission's jurisdiction over new municipal load that served those MDL customers who have taken bundled service on or after February 1, 2001. Regardless of the enactment of this CRS provision in AB 117, the Commission also has the authority based on its general regulatory authority to regulate the rates and charges of IOU so as to assure just and reasonable rates and charges and nondiscriminatory treatment. (See, e.g., Cal. Const., art. XII, §5; Pub. Util. Code, §§451, 453 & 701.) Moreover, under its general regulatory powers, the Commission has the authority to impose CRS on MDL customers who have not been served by IOUs but where this load was considered in DWR procurement decisions.

Pursuant to California Constitution, Article XII, Section 5, the Legislature provided the Commission with exclusive jurisdiction and general regulatory authority to assure that rates and allocation of costs are just and reasonable, and nondiscriminatory. (See generally, Cal. Const., art. XII, §5; Pub. Util. Code, §§451, 453 & 701.) Public Utilities Code Section 451 provides for just and reasonable rates, charges and services. (Pub. Util. Code, §451.)

[4] Several parties make reference to proposed legislation that has not been enacted, e.g., Senate Bill No. 816, Senate Bill 888 and Senate Current Resolution No. 39. (Cities' Application for Rehearing, pp. 5 & 9; CMUA's Application for Rehearing, pp. 9-10.) Legislative bills that have not been enacted and proposed legislative bills that have not passed have little value as evidence of legislative intent. (See e.g. *Lolley v. Campbell* (2002) 28 Cal.4th 367, 379.)

Public Utilities Code Section 453 prohibits the granting of preference or advantage to any corporation or person. (Pub. Util. Code, §453.) Public Utilities Code Section 701 provides the Commission with a broad authority to do all things necessary in carrying out its regulatory duties, including ensuring just and reasonable allocation of costs and nondiscriminatory treatment. (Pub. Util. Code, §701.)

To make a distinction between new municipal loads of those served by an IOU and those who were not would result in discriminatory treatment. Further, there is no rational basis for allocating costs to the former while allowing the latter to escape costs that were incurred on behalf of this load. As a result some municipal load would be paying the CRS for those who would be escaping their cost responsibility. Therefore, the result would have been an unjust and unreasonable allocation of costs.

There is no language in AB 117 or elsewhere that prevents this Commission from imposing CRS on new municipal load involving customers who had not taken service from any IOU. To read such a prohibition into the statute would be contrary to the principle of statutory construction that prohibits a construction that would "add to or alter the words of the statute to accomplish a purpose that does not appear on the face of the statute." (*Public Utilities Com. v. Energy Resources Conservation & Dev. Com.* (1984) 150 Cal.App. 150 Cal.App.3d 437, 444, internal quotation marks omitted.) In addition, "hidden meanings not suggested by the statute or by the available extrinsic aids" should not be sought (*Id*.)

Further, this approach would be inconsistent with the legislative objectives for preventing cost-shifting expressed in Public Utilities Code Section 366.2(d). It would also constitute an "implied repeal" of our regulatory duties to ensure just and reasonable allocation of costs and nondiscriminatory treatment. Such "implied repeal" is disfavored. (See, e.g., *City and County of San Francisco v. County of San Mateo* (1995) 10 Cal.4th 554, 563.)

Moreover, Public Utilities Code Section 369 does not limit the recovery of costs from existing and future electric consumers in the IOUs' service territories. The Legislature did not repeal the Commission's authority under these statutes. We agree with PG&E that the IOU had a legal obligation as a monopoly franchise to furnish service and maintain equipment and facilities, "not only for their existing load, but also for anticipated new load." (PG&E's Response, pp. 9-10 & 13-14, citing *Lukrawka v. Spring Valley Water Co.* (1915) 169 Cal. 318, 329-330 & *Order Denying Rehearing of Interim Decision (D.) 01-01-046* [D.01-07-033, p. 1 (slip op.)] (2001) ___ Cal.P.U.C.2d ___, in support of the IOUs' regulatory obligation to plan for growth within its service territories.) Because of this obligation, the IOUs were required to purchase for new growth, and did. For example, PG&E points out that they provided forecasts to DWR that included future growth. Thus, DWR made purchases based on these forecasts, and consequently, has incurred costs on behalf of this new load. (See discussion, *infra*.) Accordingly, new municipal load, regardless of whether there was a customer relationship between the MDL customer and any IOU, is responsible for paying DWR incurred costs. Imposing this responsibility on new municipal load for costs incurred is consistent with the legislative objectives of preventing cost shifting underlying Public Utilities Code Section 369 and AB 117, and such costs are permissive under Commission's general regulatory authority in Public Utilities Code Sections 451, 453 and 701.

B. The MDL CRS Decision does not regulate publicly owned utilities, and there is no violation of Article XI, Section 9(a) of the California Constitution.

CMUA, San Marcos, Cities, and Industry assert that the MDL CRS Decision interferes with the establishment and operation of municipally owned electric utilities that are newly formed and, thus, constitutes an unlawful regulation of municipal utilities in violation of the rights of these municipalities under Article XI, Section 9(a) of the California Constitution. (CMUA's Application for

Rehearing, pp. 13-18; San Marcos' Application for Rehearing, p. 3; Cities' Application for Rehearing, pp. 13-15; Industry's Application for Rehearing, pp. 13-16.) This assertion has no merit.

In the MDL CRS Decision, we explained why the adoption of the MDL CRS did not interfere with the jurisdiction of publicly owned utilities, as provided for in the California Constitution. We stated:

> "We acknowledge that this Commission does not have authority to regulate the rates, charges or service of municipal utilities. Subject to limitations set forth in the California Constitution, the Legislature has plenary power to delegate authority to the Commission and to impose regulations on publicly owned utilities. [Footnote omitted.] The publicly owned utilities are given exclusive power to establish the rates and charges paid by their customers for services provided by these utilities. [Footnote omitted.]
>
> We reject Municipal parties' arguments, however, that imposition of cost responsibility on departed IOU customers now served by publicly owned utilities constitutes regulation of the publicly owned utility. The surcharges that we authorize herein shall be part of the IOU tariffs, and as such, entail regulation of the IOUs. Although the surcharges will apply to customers that are presently being served by municipalities, the surcharges will be calculated, billed, and collected as a function of IOU tariffs. We defer to a separate order the specific means by which the billing and collection process will be implemented. Consequently, none of the actions we adopt in today's order constitutes regulation of rates that municipalities charge for their own service." (D.03-07-028, pp. 19-20.)[5]

[5] Also, in support of its allegation that the Commission is regulating publicly owned utilities, CMUA raises an issue concerning billing and collection of MDL CRS. (CMUA's Application for Rehearing, pp. 19-21.) In the MDL CRS Decision, we deferred all issues concerning billing and collection for further consideration (D.03-07-028, pp. 14, 20 & 28) and, thus, any challenges to any determination that the

(continued on next page)

Consequently, the claim that we are regulating publicly owned utilities, whether existing or newly formed, is without merit. Thus, the cases cited by some of the rehearing applicants, e.g., *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154, *Durant v. City of Beverly Hills* (1940) 39 Cal.App.2d 133 and *American Microsystems, Inc. v. City of Santa Clara* (1980) 137 Cal.App.3d 1037, to support the claim that the Commission is regulating the formation or operations of publicly owned utilities, have no applicability here.

Further, the Commission has exclusive jurisdiction to regulate public utility rates and charges. (See Cal. Const., art. XII, §6; see also, *Hillsboro Properties v. Public Utilities Com.* (2003) 108 Cal.App.4th 246, 258.) This regulation encompasses the Commission's fair share allocation of CRS to MDL customers, which will be part of the IOUs' tariffs.

Also, the Commission is not stopping the formation of publicly owned utilities. The Commission is only implementing the mandates of the Legislature to prevent cost shifting through its regulation of IOU charges, including those imposed upon MDL customers. However, the rehearing applicants, on this issue, are essentially claiming that because CRS incidentally touches upon the publicly owned utilities through their MDL customers, this is a constitutionally prohibited interference. This claim is without merit.

Merely because the CRS affects MDL customers and, thus, incidentally touches upon publicly owned utilities, does not constitute an interference with the municipal utilities' rights under the California Constitution, Article XI, Section 9. The Courts have held that incidental effects in the Commission's exercise of its jurisdiction in accomplishing a legislative objective

---

(continued from previous page)
Commission might make about billing and collection are premature and not ripe. Accordingly, we deny the billing and collection issues raised in CMUA's Application for Rehearing on these grounds.

of state-wide concern does not offend the provisions of Article XI, Section 9 of the California Constitution. (See e.g. *Cucamonga County Water District v. Southwest Water Co.* (1971) 22 Cal.App.3d 245, 257; *Polk v. City of Los Angeles* (1945) 26 Cal.2d 519, 541; *Department of Water and Power of the City of Los Angeles v. Inyo Chemical Company* (1940) 16 Cal.2d 744, 754; see also, *California Apartment Association v. City of Stockton* (2000) 80 Cal.App.4th 699, 707-709; *Wilson v. Waters* (1941) 19 Cal.2d 111, 119.)

In enacting AB 1X[6] and AB 117 to prevent cost-shifting, a matter of state-wide concern, the Legislature conferred upon the Commission additional powers, including those that permit the Commission to impose CRS upon the MDL customers. The Legislature conferred these powers pursuant to Article XII, Section 5 of the California Constitution, which states, in relevant part:

> "The Legislature has plenary power, unlimited by the other provisions of this constitution . . . , to confer additional authority and jurisdiction upon the [C]ommission. . . ." (Cal. Const., art. XII, §5.)

Thus, we have the authority to adopt the MDL CRS and promulgate the rules and regulations for implementation. The constitutional provisions concerning the formation or operations of municipal utilities set forth in Article XI, Section 9 of the California Constitution do not limit the Commission's authority. (See *California Apartment Association v. City of Stockton , supra*, 80 Cal.App.4th at p. 708.)

Several rehearing applicants also contend that we are preventing the formation of new publicly owned utilities by imposing the CRS only on these entities and, therefore, acting in violation of Article XI, Section 9 of the California Constitution. (See, e.g., CMUA's Application for Rehearing, pp. 14-16.) This contention is without merit. Although we have legitimate concerns that

[6] Stats. 2001 (1st Extraordinary Sess.), ch. 4.

municipalization might permit some MDL customers to avoid CRS, the MDL CRS Decision does not order or prohibit any entity from municipalizing. Rather, in order to prevent cost-shifting, we are simply determining that MDL customers of publicly owned utilities formed on or after February 1, 2001 are subject to CRS. This determination is based on the evidence in the record and the mandates of AB 1X and AB 117, and is within the Commission's regulatory power to make.

C. The Commission correctly concluded that there was no basis for providing an exemption specifically for all MDL customers from paying CRS, and lawfully refused to provide an exception from MDL CRS for the load that was excluded in PG&E's forecast.

CMUA argues that the Commission abused its discretion by failing to exempt from the MDL CRS the load that was excluded from PG&E's forecast. CMUA claims this was a multi-year (2001-2005) forecast of load departing to MID and Merced Irrigation District. (CMA's Application for Rehearing, pp. 21-26.) This argument is without merit.

In D.03-07-028, we discussed PG&E's forecast and noted that the forecast was not provided to DWR until June 2001. (D.03-07-028, p. 31.) We also discussed CMUA's argument and, based on the evidence in the record, found the argument unpersuasive. (D.03-07-028, pp. 34-36.)

PG&E's Witness Dennis Keane testified that PG&E provided the forecast in June 2001. (RT Vol. 13, pp. 1685-1686 (PG&E/Keane).) The June 2001 date was after DWR had made the bulk of its purchases. (See RT Vol. 16, pp. 1977-1978 (ORA/Casey).) Thus, the PG&E forecast cannot be used to establish that DWR specifically excluded load for MDL from its purchases.

Further, Navigant Witness Craig McDonald testified that DWR assumed no load reductions associated with municipalization efforts, because it had no estimate of how much departing municipal load there would be from 2001 through 2011. (RT Vol. 12, pp. 1498-1499 (DWR/McDonald).) Also, McDonald

indicated that municipalization was not factored in because of the lead time it takes to municipalize an area. (RT Vol. 12, pp. 1498-1499 (DWR/McDonald); see also, discussion, D.03-07-028, pp. 34-35.) From this evidence, and lack of convincing evidence to the contrary, the Commission reasonably concluded DWR made no specific load forecast adjustment for MDL. Therefore, there was no basis to adopt a specific CRS exclusion expressly for MDL customers. (D.03-07-028, p. 36.)

CMUA argues that even if the August 2000 report was not submitted to DWR until after DWR contracted for the bulk of the power, DWR must have had other bypass reports from PG&E. (CMUA's Application for Rehearing, pp. 23-24, fn. 56.) Because there is no evidence that DWR received such reports, this argument has no merit. Also, as discussed above, DWR provided for no such offset in its purchases.

D. A limited rehearing is granted regarding the Commission's determination to exempt the new municipal load of existing publicly owned utility but not the new municipal load of newly formed publicly owned utilities.

San Marcos, Cities and Industry assert that the Commission's justifications for not exempting new MDL of newly formed publicly owned utilities, including to prevent cost-shifting and to eliminate incentives for municipalization, are arbitrary and not supported by proven facts and on the record, but rather based on speculation. (San Marcos' Application for Rehearing, pp. 3-5; Cities' Application for Rehearing, pp. 13 &16; Industry's Application for Rehearing, pp. 7-8, 16-18.)

Specifically, San Marcos claims that there is no evidence to support the Commission's conclusion that "the absence of a CRS on MDL could potentially promote unintended incentives to municipalize merely to escape DWR charges, with potential for cost shifting between customers." (San Marcos' Application for Rehearing, pp. 4-5.)

Cities specifically asserts that the Commission ignores the record that the IOU and DWR forecasts took into account the potential for municipal departing load. (Cities' Application for Rehearing, p. 13.) Cities also argues that the rationale for "grandfathering existing municipal utilities while imposing the CRS on the new load of recently formed municipal utilities lacks any evidentiary support." (Cities' Application for Rehearing, p. 16.)

In its rehearing application, Industry argues that the record fails to establish that DWR's forecasts included the new load of any municipal utility.[7] Thus, Industry argues that the record does not support Findings of Fact Numbers 10 through 16. In the alleged absence of such evidentiary support, Industry asserts that the Commission has not complied with Public Utilities Code Section 1705, requiring that findings of fact must be supported by evidence in the record. (Industry's Application for Rehearing, pp. 16-18.)

We disagree with these allegations. Our concerns regarding municipalization and cost-shifting were rationally based and, thus, not arbitrary, and the record supports these concerns. This is also true for our determination that new municipal load was not excluded from consideration in DWR purchases and, therefore, DWR incurred costs for this load.

There is evidence to support our concern that the absence of a CRS on MDL could potentially promote unintended incentives to municipalize, resulting

[7] Industry argues that the evidence does not demonstrate cost-shifting, but rather it demonstrates that Industry did not cause any cost-shifting because it believes that Edison's forecasts likely excluded Industry's load. Accordingly, Industry argues that if its load was not included, there was no cost shifting. (Industry's Application for Rehearing, pp. 7-8.) Although the record shows that Edison did know about Industry's activities as a municipal utility that had been formed in April 2001, there is no evidence that Edison included such information in the forecasts provided to DWR. Further, Edison indicated that they were unaware that customers were actually taking service from Industry until after June 14, 2002. (Exhibit 81, pp. 1-2.)

in cost-shifting between customers. The record provides the following evidence justifying our concerns about municipalization:

- Edison's Witness Kevin Payne testified that there are "somewhere around 50 cities out of the 180 or so in [Edison's] territory that were considering some form of energy-related activity, many of which were what is refer[red] to as the new municipal utilities." (RT Vol. 13, p. 1639.) He further noted that the migration of load into these municipal utilities has the potential of being quite significant if CRS was not applied to this load. (RT Vol. 13, p. 1640.) He also stated that a number of cities have told Edison that this was the specific reason for becoming municipal utilities, and they depended on the outcome of the proceeding. (RT Vol. 13, p. 1640.) He also stated that at least "10 to 15 cities have passed ordinances or resolutions which would allow them to provide utility service." (RT Vol. 13, p. 1642.)

- Even CMUA acknowledged the level of municipalization would be affected by whether the Commission decided to impose CRS on MDL customers. (Opening Brief of CMUA on Municipal Departing Load Issues, dated November 25, 2002, p. 58.)

A review of the record shows that the new load of newly formed publicly owned utilities were not excluded from DWR's forecast, and thus costs were incurred for this new load. The record establishes the following:

- Navigant Witness Craig McDonald testified that DWR assumed no load reductions associated with municipalization efforts, because it had no estimate of how much departing municipal load there would be from 2001 through 2011. (RT Vol. 12, pp. 1498-1499.) Also, McDonald indicated that municipalization was not factored in because of the lead time it takes to municipalize an area. (RT Vol. 12, pp. 1498-1499); see also, discussion, D.03-07-028, pp. 34-35.)

- SDG&E's Witness Douglas Hansen noted that SDG&E expected to serve all gas and electric customers taking service in its service territory in the future and, thus, did not assume some level of municipal departing load over the next 10 to 15 year period. (RT Vol. 15, pp. 1838-1840.) He also believed that while DWR had forecast for distributed generation (self generation), DWR did not have a "forecast of increasing amounts of municipal customer

> growth that would have otherwise been served by an IOU that was taken into account by DWR in its procurement decisions." (RT Vol. 15, p. 1840.) He also testified that "to the extent that DWR relied upon a forecast made by SDG&E, [its] forecast would show no departing load to municipal service." (RT Vol. 15, p. 1841.) He indicated that he believed that SDG&E's forecast also assumed no departing load associated with municipalization. (RT Vol. 15, p. 1841.)

Thus, this evidence shows that since DWR's forecasts did not exclude the new load that would have resulted from the formation of new publicly owned utilities, it is reasonable to infer that DWR incurred costs for this load in its procurement of electricity on behalf of the IOUs. Consequently, since costs were incurred for this load, MDL customers of these newly formed municipal utilities should be responsible for paying CRS so that there will be no cost-shifting.

Also, contrary to Cities' assertion, the Commission did not ignore allegedly contrary evidence, such as PG&E's forecasts. Rather, in weighing the evidence, the Commission found unpersuasive the argument that new municipal load had been specifically excluded by DWR in making its purchases. Thus, the Commission was not convinced by this evidence to adopt an exemption for all MDL customers from having to pay CRS.

However, we acknowledge that to a limited extent, the record shows that there was evidence that the utility did include some new municipal load in the forecasts that were provided to DWR. Such evidence includes the following:

- DWR Witness Craig McDonald indicated that DWR made no adjustments to IOUs' forecasts that might have include movement/migration to publicly owned utilities. (RT Vol. 12, p. 1499.)

- Edison's Witness Kevin Payne indicated that although he did not know for certain, he suspected that Edison's load forecast probably did not reflect a tremendous amount of municipal activity. In his testimony, he thought this would be true if one were to look at the amount of municipal activity regarding cost responsibility for CTC. Thus, Payne indicated that if you were to look at it on a historical

basis, there would be a minuscule amount in the load forecast. (RT Vol. 13, pp. 1670-1672.)

- PG&E's Witness Dennis Keane indicated that historically the numbers for municipal departing load would have been small. (RT Vol. 14, p. 1771.)

- ORA witness Sean Casey assumed that Navigant may have included load forecasts for DWR which incorporated some estimate of future growth based on new municipal customer load, but noted that there was no specific forecast for MDL. (RT Vol. 16, p. 1981.)

Based on this evidence, we determined that some limited exemption should be provided to new municipal load. We attributed this new load to existing publicly owned utilities. However, the record for extending this exemption to existing publicly owned utilities and not to newly formed ones appears to be inadequate on this allocation issue. Therefore, we grant a limited rehearing. A record needs to be developed concerning whether, or to what extent, there is sufficient factual basis for a CRS allocation based on whether the publicly owned utility was formed before or after February 1, 2001. To the extent that a distinction between newly formed and existing publicly owned utilities may not offer a proper basis for allocation, parties may suggest other bases that would provide an alternative acceptable allocation of CRS to new municipal load.

An ALJ Ruling shall be issued defining the scope of this limited rehearing, and shall include consideration of the following issues:

(1) What was the time period covered by the forecasts that were submitted by the IOUs to DWR, and to what extent did DWR utilize and/or rely on these forecasts in entering into its contractual commitments?

(2) What level of future load growth incorporated in the IOUs' forecasts provided to DWR was attributable to municipalization? Distinguish where possible, between municipal annexation of existing utility customer load versus municipal installation of new facilities in previously undeveloped areas?

(3) What amount of future municipal load growth in the IOU forecasts provided to DWR was expressly attributable to (a) new load of existing publicly owned utilities; (b) new load of publicly owned utilities formed on or after February 1, 2001?

(4) To what extent, if any, did DWR take into account distinctions between load growth of newly formed publicly owned utilities versus that of existing publicly owned utilities in its contractual commitments?

(5) Should the Commission apportion any CRS exception between existing publicly owned utilities and publicly owned utilities newly formed on or after February 1, 2001, as prescribed in D. 03-07-028? If not, how should any exception from paying the CRS be allocated with respect to new load?

These issues should be considered in the pending phase of the proceeding that is now considering the clarification of the "definition of existing publicly owned utilities." (See D.03-07-028, p. 62.) During these proceedings, there should be a consideration of any "unintended effect of causing impermissible cost-shifting," due to any limited exception provided for new load. (D.03-07-028, p. 61.) Parties may wish to offer methods to minimize any adverse effects, e.g., imposing caps or other limits on the exception. We note that the limited rehearing is intended to permit reconsideration of the allocation issue, and is not intended to permit relitigation of any other issues determined in the MDL CRS Decision.

Pending the outcome of this limited rehearing, and subject to adjustment and/or refunds, all new municipal load will be responsible for paying the CRS. Thus, the effects of determinations in MDL CRS Decision (D.03-07-028) concerning the allocation of the exemption for new municipal load will be stayed. (See particularly D.03-07-028, pp. 61, 73 [Finding of Fact No. 15], 76 [Conclusion of Law No. 10], and 78 [Ordering Paragraph No. 6].) The IOUs shall implement a memorandum account to track the cost responsibility of this new municipal load.

E. The due process challenges are without merit.

Parties, including, CMUA, MID, Cities, and Industry, raise due process challenges involving the effective date for applying CRS on MDL customers. (CMUA's Application for Rehearing, pp. 19-21; MID's Application for Rehearing, pp. 3-4; Cities' Application for Rehearing, 16-18; Industry's Application for Rehearing, pp. 10-13.) These rehearing applicants accuse the Commission of retroactive imposition of CRS on the MDL, by choosing February 1, 2001 as the effective date, instead of some other date, such as July 10, 2003, the effective date of the MDL CRS Decision; March 29, 2002, the date of the ALJ Ruling which made the MDL a separate phase; some other future date, including September 27, 2002 when the ALJ denied CMUA's motion for summary disposition; or an unspecified date. (MID's Application for Rehearing, p .3; CMUA's Application for Rehearing, p. 21; Industry's Application for Rehearing, pp. 12-13; Cities' Application for Rehearing, p. 18.)

In the MDL CRS Decision, we addressed similar due process claims, and rejected them. We stated:

> "We also reject the claim of parties that MDL customers were not served proper notice of cost responsibility until March 29, [2002], or (in the case of Corona) that proper notice has even now not yet been served. We find that all electric consumers within the IOU service territories were placed on notice of their potential liabilities for DWR's procurement costs when the Legislature enacted SB 7X on January 17, 2001, and were placed on further notice by the enactment of AB 1X on February 1, 2001, authorizing DWR to continue its procurement program through December 31, 2002. With respect to the HPC, we accept the date of March 29, 2001, for purposes of serving notice since it is outside the scope of the above-mentioned legislation." (D.03-07-028, p. 12.)

Thus, the due process allegations should be denied. The parties had notice and an opportunity to be heard on the effective date of imposing CRS on MDL customers of publicly owned utilities, both existing and to be formed. The

parties were allowed to present their positions. Further, there was cross-examination about municipal load, including load that would occur as a result of municipalization through expansion of existing publicly owned utilities and newly formed publicly owned utilities. (See discussion, *infra*.) Thus, the claim that due process was violated is without merit.[8]

In terms of notice to publicly owned utilities or such entities formed after the proceeding or the issuance of the decision, their due process has not been denied. As discussed above, the Commission provided notice and opportunity for interested parties to be heard on the issues involving MDL and all interested parties were provided notice with the enactment of the statute. We are not at fault if some chose not to participate or did not realize that they needed to participate. Legally sufficient notice was given.

Further, the effective date of February 1, 2001 was chosen in compliance with Public Utilities Code Section 366.2(d). This statutory provision mandated a date of February 1, 2001, for imposing CRS on direct access customers and departing load customers, so as to prevent cost-shifting. (See Pub. Util. Code, §366.2, subd. (d).) Any discretion that we might have had in choosing a different date was limited by this statute.

F. The MDL CRS Decision does not interfere with past investments or impair existing contracts.

Industry argues that the MDL CRS Decision's retroactive application ignores past investments and thus impairs existing contracts. (Industry's Application for Rehearing, pp. 8-9.) Specifically, Industry sets forth a policy

[8] Those portions of AB 117 that provided for customers of community aggregation programs formed by cities or counties and a mechanism for recovery of costs incurred by DWR and the IOUs was another means of giving notice to MDL customers, existing publicly owned utilities, and those thinking about forming new publicly owned utilities that CRS might be imposed on them as well.

argument by asserting that the MDL CRS Decision "runs contrary to the principle embodied in AB 1890 that past investments made in electric utility infrastructure in accordance with the rules that existed at the time the investment was made should be honored." (Industry's Application for Rehearing, p. 9.) This policy argument has no merit.

As discussed above, the decision does not regulate or interfere with the operations of any publicly owned utility. Accordingly, the decision also does not interfere with the past investments or existing contracts of publicly owned utilities. Rather, the MDL CRS is imposed on the MDL customers through the tariffs of the IOUs and not on the publicly owned utilities. Thus, there is no interference.

If there is any technical effect, it is unintended. The link between the imposition of MDL CRS and any unintended effect on past investments or contracts is too indirect and tangential. Also, any unintended effects alleged are speculative. Otherwise, any action by the Legislature or the Commission that indirectly "touches" any contract would constitute an impairment of contract. (See generally, *United States Trust Co. v. New Jersey* (1977) 431 U.S. 1, 22, noting that it would be unreasonable to apply the constitutional contract clauses to such indirect effects.)

Further, in adopting MDL CRS, the Commission is merely implementing the mandates of Public Utilities Code Section 366.2(d), as codified by AB 117. This statutory provision was enacted for the purpose of clarifying that the objective of Water Code Section 80110 was to prevent cost-shifting. (See Pub. Util. Code, §366.2, subd. (d).) There is nothing in this statutory provision or elsewhere in the law that requires the Commission to account for past investments or existing contracts in its determination of the CRS for MDL.

Therefore, we find no merit to Industry's argument about interference with past investment and existing contracts. Accordingly, we deny rehearing on this issue.

G. The Rate Agreement does not prohibit the adoption of DWR components of the MDL CRS.

MID asserts that pursuant to the Rate Agreement[9] entered into between the Commission and the Department of Water Resources ("DWR"), MDL customers cannot be assessed DWR's bond charges. (MID's Application for Rehearing, pp. 4-5.) MID relies on language in both Section 1.1 of the Rate Agreement and D.02-02-051, the Commission's decision adopting the Rate Agreement. This reliance is misplaced.

The Rate Agreement addresses imposing DWR's bond and power charges on the retail end-use customers of the IOUs and ESP providers. (Rate Agreement, §§1.1 & 4.3, pp. 1 & 8.) However, it does not address whether DWR's bond charges should be imposed on MDL customers of publicly owned utilities. The fact that the Rate Agreement did not include publicly owned utilities in its definition of an ESP does not mean that MDL customers would not be subject to DWR bond and power charges. (See also, D.03-07-028, p. 28, fn. 40 and accompanying text.) Indeed, any reliance by third parties on this language would be unjustified based on Section 11.8 of the Rate Agreement, which states that:

> "Nothing in this agreement express or implied shall be construed to give any person or entity, other than the parties hereto and the Beneficiaries, any legal or equitable right, remedy, or claim under or in respect of the agreement or any covenants, agreements, representations, or provisions contained herein." (Rate Agreement, §11.8, p. 16.)

Moreover, D.02-02-051 specifically notes that whether certain customers of municipal utilities should be required to pay a bond charge is an

[9] A copy of the *Rate Agreement* can be found as Appendix C in *Opinion Adopting a Rate Agreement Between the Commission and the California Department of Water Resources* ("*Rate Agreement Decision*") [D.02-02-051] (2002) ___ Cal.P.U.C.2d ___.

issue for the Legislature to determine. (See *Rate Agreement Decision* [D.02-02-051, supra, at p. 35, fn. 112 (slip op.).) Accordingly, the Rate Agreement is not applicable.

When it enacted AB 117, the Legislature stated that it intended that "each retail end-use customer" that purchased bundled power "on or after February 1, 2001" would bear a "fair share" of DWR's power and bond charges. (Pub. Util. Code, §366.2, subd. (d)(1).) As discussed elsewhere in this order, enactment of this statutory provision applied not only to direct access customers, but also to departing load customers. Thus, DWR's power and bond charges were applicable to customers of publicly owned utilities, pursuant to the legislative mandates of AB 117. In D.03-07-028, the Commission determined that the DWR power and bond charges should be imposed on "MDL customers that took bundled service on or after" February 1, 2001 (D.03-07-028, pp. 27-28) and "new MDL served by a new publicly-owned utility" (D.03-07-028, p. 61). This determination is consistent with our previous decisions concerning bundled and direct access customers and equity considerations. Accordingly, AB 117 specifically authorizes us to impose DWR's bond and power charges on MDL customers, and we have adopted the MDL CRS in a manner consistent with our previous decisions.

H. MID's assertion that MDL customers retain exemptions from CRS provided to them as bundled customers is both unsupported by the record and outside the scope of this decision.

In its rehearing application, Modesto contends that exemptions from all or a portion of CRS that were granted to identified categories of bundled IOU customers, such as CARE and medical baseline customers, should be "equally applicable to MDL customers within those identified categories." (MID's Application for Rehearing, p. 7.) Otherwise, it asserts that there would be a "discriminatory imposition of burden" on the municipal customers. MID failed to raise this issue in its testimony or comments. Thus, no parties have been given notice and the opportunity to comment on whether such exemptions are warranted.

Consequently, there is no record evidence to support granting exemptions to MDL customers who would be considered CARE or medical baseline customers, or residential customers under 130% of baseline quantities. Accordingly, consideration of MID's request at this time would be both contrary to the Commission's rules and would deny other parties in this proceeding due process.

MID's request is also outside the scope of this decision. Rather, it is an issue of determining the tariff amount to be imposed on MDL customers, and would be more properly addressed as part of determining the process to bill and collect the CRS from MDL customers. The MDL CRS Decision states that the "methodological approach for determining DWR cost responsibility adopted for DA customers in D.02-11-022 [shall] be applied to encompass MDL" and ordered a technical workshop to address implementation of the MDL CRS. (D.03-07-028, pp. 68-69.) Thus, MID has an opportunity to raise as part of its comments in that workshop the issue of whether such a statutory exception is permissible and should be accorded to certain categories of MDL customers.

I. The CRS Provisions of AB 117 are applicable to MDL customers.

In its rehearing application, MID argues that AB 117 applies only to bundled IOU customers who depart the IOU in favor of community choice aggregation programs and cannot be applied generally to MDL customers. (MID's Application for Rehearing, 5.) It maintains that this assertion is supported by the fact that Section 366.2(d) is "buried" within AB 117 and that the Senate Floor analysis of the bill only discusses community aggregation. MID is incorrect.

Section 366.2(d) refers to "*each* retail end-use customer that purchased power from an electrical corporation." (Pub. Util. Code, § 366.2, subd. (d) (emphasis added).) In contrast, subdivision (e) of Section 366.2 refers to "*a* retail end-use customer that purchases electricity from a community choice aggregator *pursuant to this section*" and subdivision (f) of Section 366.2 refers to "*a* retail end-use customer purchasing electricity from a community choice

aggregator *pursuant to this section*." (Pub. Util. Code, § 366.2, subd. (e) & (f) (emphasis added).) Had the Legislature intended to limit the applicability of subdivision (d) to only bundled IOU customers who subsequently become customers of a community aggregator, it would have used more limiting language, as it did in subdivisions (e) and (f) of Section 366.2.[10] However, no such language is used, and it would be improper to infer such a limitation.[11] (See, e.g., *Breshears v. Indiana Lumbermen* (1967) 256 Cal.App.2d 245, 250, discussing plain language of statute; *People v. Baker* (1968) 69 Cal.2d 44, 50, stating that courts should not insert or delete words in a statute or give a different meaning to the words used.)

Moreover, MID's reference to the Senate Floor analysis of the bill is unpersuasive. That analysis discusses community aggregation in general, and does not necessarily include each and every point of the bill. In contrast, Section 366.2(d)(1) specifically states that "it is the *intent* of the Legislature that each retail end-use customer . . . should bear a fair share of the Department of Water Resource's electricity purchase costs . . ." (Pub. Util. Code, §366.2, subd. (d) (emphasis added).) Accordingly, the Commission reasonably concluded that Section 366.2(d) applies to MDL customers, not just bundled IOU customers who subsequently became customers of a community aggregator.

---

[10] The MDL CRS Decision also notes this distinction: "The grant of authority [in AB 117] is thus framed in the general context of bundled IOU customers as of February 1, 2001, not merely in the context of a DA or community aggregation customer. AB 117 does not carve out exceptions from cost responsibility for customers departing to a municipal utility." (D.03-07-028, p. 22.)

[11] Also, the title of the statute in West's Annotated Code, "Aggregation of customer electric loads with community choice aggregators" cannot be read as creating such a limitation. Public Utilities Code Section 6 specifically states: "Division, part, chapter, article and section headings do not in any manner affect the scope, meaning or intent of the provisions of this code." (Pub. Util. Code, §6.)

As an alternative, MID asserts that even if the provisions of AB 117 were applicable to MDL customers, its customers would not have an obligation to pay the CRS because "evidence presented in this proceeding shows that . . . MDL customers served by Modesto have paid and continue to pay their 'fair share.' " (MID's Application for Rehearing, p. 6.) Therefore, MID maintains that imposing the MDL CRS on its customers would represent an inequitable shifting of costs. Because MID failed to cite specifically to the record, it is difficult to determine what evidence it believes makes such a showing. Nonetheless, we find MID's assertion to be without merit.

In its rehearing application, MID states that its rates "already cover Modesto's costs incurred benefiting the grid." (MID's Application for Rehearing, p. 6.) This statement, however, simply suggests that MID has paid certain transmission costs to the IOU. The DWR component of MDL CRS concerns *power* costs, not transmission costs. Accordingly, costs paid to "benefit the grid" are not part of CRS and do not represent an inequitable shifting of costs.

Furthermore, there does not appear to be any evidentiary support that Modesto MDL customers are already paying their "fair share" of CRS. A review of the evidentiary record indicates that MID stated that it was "constructing power plants, and has entered into the very same types of forward contracts, including some above-market contracts, as did DWR, in order to meet Modesto's anticipated new load" of customers departing PG&E. Consequently, it argues that these departing customers "would be forced to pay twice for the same type of service if they are held responsible for CRS." (*Opening Brief of Modesto Irrigation District Regarding Municipal Departing Load Exit Fees*, November 25, 2002, p. 9.) If this is the basis for MID's assertion in its rehearing application, it is incorrect. The MDL CRS concerns costs incurred by DWR on behalf of the customers of the IOUs, which include DWR's bond and power charges, as well as other costs incurred by IOUs. Costs incurred by a municipality as a result of anticipated new load are not part of the CRS, even if those costs are similar to costs incurred by

DWR and the IOU. Therefore, contrary to MID's assertion, these MDL customers will not be paying "twice for the same type of service." Accordingly, there is no basis to conclude that MID's MDL customers should be exempt from paying the CRS.

J. The request for clarification of the MDL CRS Decision to include SSJID as an existing publicly owned utility should be denied.

In its rehearing application, SSJID requests that the MDL CRS Decision be clarified to state that it is an existing publicly owned utility, and thus any new load in its service areas is not subject to a CRS. (SSJID's Application for Rehearing, pp. 6-9.) SSJID's request is outside the scope of the MDL CRS Decision. This decision gave a general definition of "existing publicly-owned utilities" and used the cutoff date of February 1, 2001, consistent with the mandate of AB 117. (D.03-07-028, p. 61; see also, Pub. Util. Code, §366.2, subd. (d)(1).) The MDL CRS Decision also ordered further proceedings to clarify this definition and determine which publicly owned utilities would be entitled to exceptions from the CRS. (D.03-07-028, p. 62.) An Administrative Law Judge ("ALJ") Ruling issued on July 23, 2003 requested comments from parties "as a basis to develop comprehensive and final criteria for identifying POU entities whose MDL departing load customers would qualify for exclusion from the CRS." (*ALJ's Ruling Soliciting Comments on the Criteria for New Load Exception for Existing Publicly Owned Utilities*, July 23, 2003, p. 2.) Any determination whether SSJID would fall within the definition of "existing publicly-owned utilities" will be considered as part of that proceeding, as well as a determination whether new MDL customers of SSJID should be exempt from the CRS. Accordingly, SSJID's request for clarification is denied.

///

///

///

K. The Commission was correct in not treating MDL customers the same as CGDL customers or continuous direct access customers who received exceptions from having to pay CRS, and in rejecting the *de minimus* argument.

Cities argues that the MDL CRS Decision is not consistent with previous decisions, including D.03-04-030 that permitted exceptions for net-metered and ultra-clean customer generation. (Cities' Application for Rehearing, pp. 11-12.) Specifically, Cities claims that the MDL customers are in comparable positions as Customer Generation Departing Load ("CGDL") customers involving net-metered and ultra-clean customer generation and continuous direct access customers and, thus, should receive an exception. Cities also argues that the cost-shifting would be *de minimus*.

In the MDL CRS Decision, we rejected the *de minimus* and comparability arguments. (D.03-07-028, pp. 12 & 36-37.) Our analysis of these issues has not changed. The legislative mandate is to prevent cost-shifting. This is accomplished by the Commission's determination of the "fair share" under Public Utilities Code Section 366.2(d), as codified by AB 117. The statute itself does not provide for an exception based on how large the resulting cost-shifting will be. Further, no other statute provides for such an exemption as it applies to MDL customers. Thus, we reasonably concluded: "Cost shifting is not determined by how large any resulting cost effects are, but involves consistent application of a legislatively mandated intent independent of the specific magnitude of load." (D.03-07-028, p. 12.)

With respect to comparability, Cities' argument has no merit. MDL customers are not similar to continuous direct access customers. MDL customers, as designated by the MDL CRS Decision are those that departed the IOU on or after February 1, 2001. Continuous direct access customers are those customers exempted from paying CRS because they took no bundled service on or after

February 1, 2001. Thus, MDL customers and continuous direct access customers are not similarly situated.

There is also no comparability between MDL customers and CGDL customers. They are different, as the Commission noted:

> "This argument fails to recognize the difference between the treatment of Customer Generation versus Municipal Load in DWR's forecasting and contracting practices. While DWR actually forecasted a specific amount of departing load associated with new customer generation, it made no corresponding MDL forecast. The amount of customer generation departing load proposed to be exempt from the CRWS, by contrast, is directly tied to this DWR forecast."

(D.03-07-028, pp. 36-37, citing to Exhibit 72, p. 7 (DWR/McDonald) & RT Vol. 12, pp. 1473-1475 (DWR/McDonald); see also, discussion above and RT Vol. 12, pp. 1498-1499 (DWR/McDonald) & RT Vol. 16, pp. 1975-1978 & 1981 (ORA/Casey), which shows that Navigant made specific forecasts for CGDL, but not MDL.)

Also, we granted exceptions for CGDL involving net-metered and ultra-clean customer generation in D.03-04-030 based on the need to harmonize the mandates of AB 117 with the legislative objectives set forth in other statutes to promote renewable energy resources as another means of addressing energy problems confronting California. We noted:

> "[I]n addressing the energy problems confronting California which resulted in the enactment of AB 1X, the Legislature also enacted several laws with the legislative objectives to promote investment and construction of renewal energy resources, diversify California's energy resource mix, stabilize California energy supply infrastructure and produce economic and environmental benefits. [Citation omitted.]
>
> In implementing AB 117, we are cognizant that our implementation should not be in conflict with other statutes, including the legislative intent codified in these statutes, that were enacted at the same time and

> in response to the electricity problems confronting California. It is important that the Commission's determinations regarding its implementation of AB 117 should be in harmony with those other statutes the Legislature enacted in response to the energy problems confronting California. Thus, our interpretation in today's decision reflects our harmonizing of the AB 117 and these statutes.[Footnote omitted]
>
> Accordingly, we have provided for CRS exceptions as specified in today's decision." (*CGDL CRS Decision* [D.03-04-030], *supra*, at pp. 38-39 (slip op.).)

In D.03-04-030, we gave an example of a conflict posed by Public Utilities Code Section 353.2, which provides:

> "In establishing rates and fees, the commission may consider energy efficiency and emissions performance to encourage early compliance with air quality standards established by State Air Resources for ultra-clean and low-emission distributed generation." (Pub. Util. Code, §353.2, subd. (b).)

Despite "apparent contrary language in AB 117," we harmonized Public Utilities Code Section 366.2(d) with Public Utilities Code Section 353.2(b) and permitted an exception for the payment of CRS for load involving ultra-clean and low-emission distributed generation." (*CGDL CRS Decision* [D.03-04-030], *supra*, at pp. 38-40 (slip op.).)

This interpretation is consistent with the rules of statutory construction. When confronted with an apparent conflict between statutes, the rules of statutory construction require that the statutes be harmonized so as to give effect to such statutes insofar as possible. (See e.g., *Waters v. Pacific Telephone Company* (1974) 12 Cal.3d 1, 11; *Rubin v. Green* (1993) 4 Cal.4th1187, 1201; *San Diego Gas & Electric Company v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 793.) The interpretation of the statutes should also be guided by consideration of the statutes in context of the statutory framework, including when the statute was enacted and for what public purpose. (See e.g., *Neumarkel v. Allard* (1985) 163

Cal.App.3d 457, 461-462; see also, *Moyer v. Workmen's Compensation Appeals Board* (1973) 10 Cal.3d 222, 230)

Unlike with CGDL, there were no other statutes, except for AB 117, involving MDL and the legislative mandates involving the Commission's regulation over electric corporations or the provision of electricity service that required harmonizing. Thus, this is another reason why MDL is different from CGDL, and not similarly situated. Accordingly, there is no unlawful discrimination. (See *Griffin v. Superior Court* (2002) 96 Cal.App.4th 757, 775 ["The equal protection clause requires the law to treat those similarly situated equally unless disparate treatment is justified," and "[t]he 'similarly situated' requirement means that an equal protection claim cannot succeed, and does not require further analysis, unless the claimant can show that the two groups are sufficiently similar."]) Further, the constitutional provision involving municipal utilities does not pose a conflict because it does not limit the Commission's ability to adopt the MDL CRS, for the reasons discussed above.

L. Ordering Paragraph 6 should be clarified.

In its rehearing application, PG&E asserts that the MDL CRS Decision errs because Ordering Paragraphs 3 and 6, taken together, appear to exempt new MDL of existing publicly owned utilities from paying any portion of the CRS, including "tail" CTC. (PG&E's Application for Rehearing, p. 1.) It maintains that this is both inconsistent with the text of the MDL CRS Decision and contrary to Public Utilities Code Section 369. (PG&E's Application for Rehearing, pp. 2-3.) Accordingly, it requests that the MDL CRS Decision be modified to state that new MDL of existing publicly owned utilities are responsible for tail CTC. CMUA, SSJID/Merced and MID all oppose PG&E's rehearing application. SDG&E and Edison support PG&E's proposed modification.

The MDL CRS Decision specifically identifies those MDL customers who are responsible for tail CTC. They are "[a]ll municipal load customers

subsequent to December 20, 1995" (D.03-07-028, p. 14), new MDL customers who were formerly bundled customers of an IOU (D.03-07-028, p. 44) and new MDL customers of new publicly owned utilities (D.03-07-028, p. 62). New MDL customers of existing publicly owned utilities who were not formerly bundled customers of an IOU, however, would be exempt from paying tail CTC if:

> "the load is being met through a direct transaction and the transaction does not otherwise require the use of transmission or distribution facilities owned by the utility." (Pub. Util. Code, §369.)

Thus, as noted in Conclusion of Law No. 12, new MDL customers of an existing publicly owned utility who were not formerly bundled IOU customers would not be subject to tail CTC under the above exception.[12] (D.03-07-028, p. 78.) Ordering Paragraph 6, however, does not clearly identify this exemption.

While PG&E has correctly pointed out that there is an inconsistency in the MDL CRS Decision, we agree with MID that PG&E's recommended change would result in imposing tail CTC on new MDL customers who were in fact exempt under Section 369. Thus, this order will clarify Ordering Paragraph 6.

III. CONCLUSION

Based on the above discussion, we are of the opinion that except for the issue concerning sufficiency of evidence involving new municipal load, good cause does not exist for granting rehearing. In today's decision, we modify the MDL CRS Decision for purposes of clarification and in the manner specified herein. Further, we correct a few typographical errors that were found in the MDL

[12] We also note that Conclusion of Law No. 12 contains a typographical error. The first sentence refers to "CRS recovery", instead of "CTC recovery." Accordingly, this order also corrects this typographical error.

CRS Decision. Accordingly, the applications for rehearing filed by CMUA, Cities, San Marcos, MID, SSJID, PG&E, and Industry are denied in all other respects.

THEREFORE, IT IS ORDERED that:

1. Limited rehearing is granted on the allocation of the exception from CRS to new municipal load of existing publicly owned utilities and not the new municipal load of newly formed utilities. Accordingly, language providing for an exemption for new load of existing publicly owned utilities is stayed and made ineffective, pending the outcome of the limited rehearing. Pending the outcome of this limited rehearing, all new municipal load of both existing publicly owned utilities and newly formed publicly owned utilities are responsible for paying the CRS at this time, subject to adjustment and/or refunds. The IOUs shall implement a memorandum account to track the cost responsibility of this new municipal load.

2. An ALJ Ruling shall be issued defining the scope of this limited rehearing, which shall include consideration of the following issues:

   a. What was the time period covered by the forecasts that were submitted by the IOUs to DWR, and to what extent did DWR utilize and/or rely on these forecasts in entering into its contractual commitments?

   b. What level of future load growth incorporated in the IOUs' forecasts provided to DWR was attributable to municipalization? Distinguish where possible, between municipal annexation of existing utility customer load versus municipal installation of new facilities in previously undeveloped areas? Should the Commission apportion any exception between existing publicly owned utilities and newly formed publicly owned utilities? If so, how should any exception from paying the CRS be allocated?

   c. What amount of future municipal load growth in the IOU forecasts provided to DWR was expressly attributable to (a) new load of existing publicly owned utilities; (b) new

load of publicly owned utilities formed on or after February 1, 2001?

d. To what extent, if any, did DWR take into account distinctions between load growth of newly formed publicly owned utilities versus that of existing publicly owned utilities in its contractual commitments?

e. Should the Commission apportion any CRS exception between existing publicly owned utilities and publicly owned utilities newly formed on or after February 1, 2001, as prescribed in D. 03-07-028? If not, how should any exception from paying the CRS be allocated with respect to new load?

3. The following sentence is added to Ordering Paragraph No. 6 on page 78 after the first sentence:

"However, new MDL of existing publicly-owned utilities that are subject to the provisions of Section 369 shall be responsible for the tail CTC component of the CRS."

4. The following typographical errors shall be corrected.

a. Reference to "CRS recovery" in Conclusion of Law No. 12 on page 76 should changed to "CTC recovery".

b. Reference to "March 29, 2001" on Lines 15 and 22 on page 12 and in Finding of Fact No. 27 on page 75 should be changed to "March 29, 2002."

c. Reference to "366(d)" on Line 4 of page 21 should be changed to "366.2(d)".

5. Excepted as provided, limited rehearing of D.03-07-028, is denied in all other respects.

This order is effective today.

Dated August 21, 2003, at San Francisco, California.

CARL W. WOOD
LORETTA M. LYNCH
GEOFFREY F. BROWN
Commissioners

I dissent.

/s/ MICHAEL R. PEEVEY
President

I dissent.

SUSAN P. KENNEDY
Commissioner